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CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 497

AUBREY B. BURTON, Doing business as A. B. BURTON COMPANY, *Appellant*,

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

STATEMENT AS TO JURISDICTION

W. G. Bussard,
Counsel for Appellant.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 497

AUBREY B. BURTON, DOING BUSINESS AS A. B. BURTON COMPANY, *Appellant,*

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

JURISDICTIONAL STATEMENT

This suit was filed by Aubrey B. Burton, doing business as A. B. Burton Company, on December 18, 1948, in the United States District Court for the Western District of Virginia, against the United States of America. The purpose of this suit was to have a special court of three judges to hear our petition, concerning certain orders issued by the Interstate Commerce Commission and then to set aside, annul, and forever enjoin the enforcement, operation or execution of Service Order No. 68, issued January 30, 1942, and orders of September 28, 1944, December 5, 1945, and April 5, 1948, issued in Docket 29072, A. B. Burton Company v. Pennsylvania Railroad.

The reasons why the report and orders aforesaid should be set aside, annulled, and the enforcement, operation and

execution thereof forever enjoined, among others, are that two District Courts hold separate views on the proper interpretation of the same statute (49 USCA 1 (15)), thus leaving uncertain the meaning of the law; that they permit the Commission to disregard the language of the statute by suspending on a nation-wide basis the application of the provisions of Rule 34 of the Classification when the statute (Section 1 (15) of the Act, 49 USCA 1 (15)) provides for the suspension of that rule only when an emergency exists, not on a nation-wide basis but when it exists "*in any section* of the country"; that they permit the Commission to exercise its extraordinary or emergency powers by suspending Rule 34 for an indefinite period of time when the statute provides that the suspension can be only "for such time as may be determined by the Commission" (but that "time" must be determined when? At the time of issue and not later); that they permit the Commission to use the power granted it by Section 1 (15) of the Act so as not to conserve railway equipment, and in a way so as to penalize the shipping public by placing the carriers in a position whereby they can unjustly enrich themselves at the expense of the shipping public; and that they permit the Commission to use that power against the public when it is to be a restraint upon the carriers.

The jurisdiction of the three-judge District Court rests upon the provisions of the Acts of Congress approved June 25, 1948 (c. 646, 62 Stat. 869) Sections 2284 and 2325, Title 28, United States Code, Judiciary and Judicial Procedure.

The decision of the Interstate Commerce Commission here considered, is a decision of the kind that is to be heard and determined by a district court of three judges. Consequently, the decision of the court in this proceeding is the kind of a decision from which an appeal to the Supreme Court is allowed by Section 1253, Title 28, United States

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Code, "Judiciary and Judicial Procedure." The jurisdiction of the Supreme Court of the United States over this suit on appeal is allowed by Section 1253, Title 28, United States Code, as that section provides:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

This is a suit that must be heard and determined by a district court of three judges, as Section 2325, Title 28, United States Code, provides as follows:

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission, shall not be granted unless the application therefor is heard and determined by a district court of three judges under Section 2284 of this title."

Then Section 2101, Title 28, United States Code, provides, in part, as follows:

> "(a) A direct appeal to the Supreme Court from any decision under sections 1252, 1253, and 2282 of this title, holding unconstitutional in whole or in part, any act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. * * *
>
> "(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree appealed from, if interlocutory, and within sixty days if final."

The decision and order appealed from were rendered and entered on the 17th day of September 1949 and the petition for leave to take an appeal and assignment of errors were filed on the 15th day of November, 1949, and within sixty days from September 17, 1949 (28 USC 2101 (b)).

The District Court erred, we believe, as a matter of law, in refusing to grant the prayer of plaintiff for an order annulling, setting aside, and forever enjoining the enforcement, operation and execution of Service Order No. 68, issued January 30, 1942, and the report and orders rendered and entered on September 28, 1944, December 5, 1945, and April 5, 1948, in Docket 29072, A. B. Burton Company v. Pennsylvania Railroad, on the grounds that said orders, as plaintiff alleges, are unlawful, and contrary to the Interstate Commerce Act (49 USCA).

The decision of this Court in this proceeding should be reviewed by the Supreme Court of the United States and the decision reversed because the decision in this cause, on the meaning of the provisions of Section 1 (15) of the Interstate Commerce Act (49 USCA 1 (15)) is contrary to the decision, *on the same provisions,* by the District Court in United States v. Thompson, 58 F. Supp. 213; that the decision, contrary to law, permits the Commission to use the extraordinary and emergency powers granted it without requiring the Commission to comply with the limitations imposed upon its action and contained in that section (see 58 F. Supp. 213); that the decision, contrary to law, permits the Commission to issue, upon its own motion, an order, affecting car service, that has nation-wide application, that does not specify the duration of the emergency, that does not conserve railway equipment, that substitutes revenue for conservation of railway equipment; and that the decision permits the Commission to grant the carriers authority to make a charge for the carriers' failure to conserve rail-

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way equipment by permitting the carriers to furnish *for a charge* a larger size car than necessary to accommodate the shipment when Section 1 (15) of the Act (49 USCA 1 (15)) does not grant the Commission authority to authorize the carriers to impose a penalty or fine upon a shipper for using a larger size car than necessary to accommodate the shipment. A penalty or fine, when equipment is wasted, cannot conserve equipment or make the wasted equipment available for use, hence, there is no authority for an extra charge for the privilege of using the larger size car.

The decision appealed from is contrary to law, as the record shows that the carriers furnished larger size cars than those ordered, that no period of time indicating the duration of the emergency was shown and that there is no authority in Section 1 (15) of the Act (49 USCA 1 (15)) that will permit an extra charge to be made, as was done here, for using the car the carriers furnished in lieu of the size of car the shipper ordered.

The questions involved in this proceeding are all substantial. A review of this proceeding should be had and the Honorable Supreme Court should eliminate the conflict between the decision in this proceeding and the decision in United States v. Thompson, 58 F. Supp. 213, and should determine if the Commission can disregard the provisions of Section 1 (15) (49 USCA 1 (15)); can impose a fine or penalty upon a shipper when, as here, the carrier has been unjustly enriched due to the failure of the carrier to furnish the size of car ordered; and can railway equipment be actually conserved and made available for use to relieve an emergency simply by paying a premium to a carrier for the failure of a carrier to supply the proper size equipment.

APPENDIX "A"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA, LYNCHBURG DIVISION

Civil Action No. 201

AUBREY B. BURTON, Doing Business as A. B. Burton Company, *Plaintiff*,

versus

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., *Defendants*

(Argued May 6, 1949. Decided Sept. 17, 1949)

Before DOBIE, Circuit Judge, and PAUL and BARKSDALE, District Judges.

PAUL, District Judge:

This is a civil action brought by the plaintiff, Aubrey B. Burton, doing business as A. B. Burton Company, against the United States of America, seeking to have set aside and annulled certain reports and orders of the Interstate Commerce Commission, and to have this cause remanded to the Commission with direction to award reparation to plaintiff for certain freight charges alleged by him to have been illegally collected. A special court has been constituted, as required by 28 USCA 2284, to hear and determine this action. The facts are as follows:

On April 17, 18, 21, 1942, Herman M. Brown Company shipped four car-load shipments of tractor-drawn road scrapers from Highland Park, Iowa, to plaintiff at Keller, Virginia. The shipper had ordered of the carrier four 40-foot cars for these shipments, but the carrier in lieu thereof, furnished two 48-foot-6-inch cars, one 42-foot-1-inch car, and one 41-foot car. Each of the carload shipments could have been loaded on cars of the length ordered, i.e., 40-foot cars, and the weights of each shipment were less than the carload minimum provided for open cars 40 feet in length.

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Under these circumstances, prior to February 15, 1942, under the provisions of Interstate Commerce Commission Rule 34, the plaintiff would have incurred freight charges based on the minimum weight fixed for the 40-foot cars ordered.

However, on January 30, 1942, in order to prevent a shortage of railroad equipment, through misuse and wasteful use of cars by improper loading, the Interstate Commerce Commission issued Service Order No. 68 suspending the operation of Rule 34 during the war emergency insofar as it permitted freight cars to be used for carload freight otherwise than subject to the carload minimum weight provided for the car *actually used*. By reason of the suspension of Rule 34 by Service Order No. 68, the plaintiff was required to pay aggregate freight charges in the amount of $276.00 more than he would have been required to pay had Rule 34 been in force.

In a proceeding entitled "*Docket No. 29072, Aubrey B. Burton &c. v. The Pennsylvania Railroad Co., &c.*", the plaintiff alleged that the freight charges assessed against him were unjust and unreasonable and sought to have the Interstate Commerce Commission award him reparation by reason of the alleged freight overcharge. The Commission dismissed the complaint on September 28, 1944. Thereafter, upon petition of the plaintiff, the Commission reopened the proceedings for hearing, and after oral hearing and argument the Commission, by its report and order of December 5, 1945, dismissed the complaint. Subsequently, plaintiff filed a petition for reconsideration and rehearing, which was denied April 1, 1946. Later, in January 1948, plaintiff filed another petition for a reopening and reconsideration, which the Commission accepted and filed of record and then denied by its order of April 4, 1948. In this last petition, plaintiff for the first time alleged that Service Order No. 68 was invalid because no termination date was fixed in the order.

Thereafter, on December 18, 1948, plaintiff instituted this action, alleging the invalidity of Service Order No. 68 because no termination date was fixed therein, and praying that this Court annul and set aside the reports and orders

of the Commission mentioned above "and remand this cause to the Commission with direction to find for plaintiff in accordance with tariffs lawfully on file with the Commission." The real purpose of this action is to have this Court adjudicate that Service Order No. 68, which is no longer in force, was invalid when issued, and to direct the Interstate Commerce Commission to award plaintiff reparation in the sum of $276.00.

At the time this case was argued the defendants promptly advanced the contention that the court was without jurisdiction, basing their position on sections 8 and 9 of the Interstate Commerce Act (49 U.S.C.A. 8 and 9) and upon the interpretation given by the courts of these provisions of the statute, which, so far as pertinent, are as follows:

> "In case any common carrier subject to the provisions of this chapter shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, * * *"
>
> "Any person or persons claiming to be damaged by any common carrier subject to the provisions of this chapter, may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. * * *"

We are inclined to agree with the position taken by defendants which was to the effect that the cited statute furnished the plaintiff the option of proceeding before the

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Commission for an award of reparations for the alleged overcharge or of instituting a suit in the district court to recover the overcharge; but that, having elected to pursue the former remedy, he could not, after failing therein, turn to the courts to recover damages. Until very recently an interpretation of the statute in accord with this viewpoint seems to have had the unanimous support of the various courts to which the question has been presented. See Ashland Coal & Ice Co. v. United States, 61 Fed. Supp. 708 (affirmed 325 U. S. 840) and the cases there cited, including Standard Oil Co. v. United States, 283 U. S. 235, 240-1; Hormel & Co. v. Chicago, etc., Ry. 283 Fed. 915, 918; Bartelsville Zinc Co. v. Mellon, 56 Fed. 2d. 154, 156; Brady v. Interstate Commerce Commission, 43 Fed. 2d. 847, 850-1; Atlantic Lumber Corp. v. Sou. Pacific Co., 47 Fed. Supp. 511, 513.

However, after the submission of the instant case and before its decision, the Supreme Court (on June 20, 1949) decided the case of United States v. I. C. C. et al., 337, U. S. 426, which we interpret as requiring that we assume jurisdiction and proceed to a determination of the case upon its merits. Counsel for all parties are agreed on submission of the case on the record and arguments already made.

Coming then to the merits, we find the issues to be within narrow limits. Section 1 (15) of the Interstate Commerce Act (49 U.S.C.A. 1 (15) provides that whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists, it shall have authority, upon complaint or upon its own initiative, with or without notice or hearing, to "suspend the operation of any or all rules, regulations or practices then established with respect to car service *for such time as may be determined by the commission.*" (Emphasis supplied.) Under this statutory authorization and because of the conditions affecting railroad transportation by reason of the war, the Commission, on January 30, 1942, issued its Service Order 68 which, among other things, suspended the operation of then existing Rule 34, with the provision "That this order (Service Order 68) shall become effective February 15, 1942, and *shall remain in force until further order of the Commission.*" (Emphasis supplied.)

Plaintiff bases his attack on Service Order 68 on the contention that it is invalid because by its terms it is made effective for an indefinite period, namely "until the further order of the Commission." Conversely stated it is contended that the order is invalid because it fixes no definite period of time for its operation. In other words we understand plaintiff to contend that the statutory grant of power to issue emergency orders "for such time as may be determined by the Commission," requires the Commission, contemporaneously with its exercise of the powers, to determine the time during which the order shall be effective and to incorporate therein a date for its termination. The plaintiff does not deny, so we understand, that if the order contained a fixed date of termination, the Commission would have the right to renew or extend it from time to time for further fixed periods of time, so long as the emergency existed.

To uphold his contention the plaintiff relies on the case of U. S. v. Thompson (D. C., Mo.), 58 Fed. Supp. 213, 216-7, which supports the position taken by him. He cites no other authority. Without attempting to set forth or analyze the reasoning of the court in the cited case, it need only be said that we are unable to agree in the conclusion reached there.

The statute (49 U.S.C.A. 1 (15)) gives the Commission broad powers in this connection. In finding the existence of an emergency it is guided only by its own opinion; and when it has found an emergency to exist it is authorized to suspend existing rules, regulations and practices upon its own initiative, with or without notice or hearing, as its judgment dictates. In view of the practically unrestricted powers which Congress has granted the Commission we see no justification for this court to impose upon it a restriction which is neither expressed or implied by the language of the statute and for which no sound reason is advanced.

It is not ordinarily to be expected that when an emergency arises requiring the action of the Commission the period of its duration can be accurately predicted; and this is certainly true when the conditions of emergency are created by a world-wide war. And we see nothing in the

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language "for such time as may be determined by the commission" that requires that body to attempt to determine beforehand how long the emergency will last rather than to determine when the emergency shall have ceased. What the plaintiff is asking is that the court add to the phrase "such time as may be determined by the commission" the additional words "at the time of issuing the suspension order." But that is not the language of the statute and we see no reason in the language as written, or in the purpose to be accomplished, for implying that the statute intended to impose any such condition.

About the only argument offered by plaintiff is that unless a time limitation is contained in the suspension order when it is issued, the Commission is not required to re-examine the situation to determine whether the emergency continues in existence at any particular time. The implication seems to be that the Commission, having entered a suspension order, might forget that it had done so and, unless subject to periodical reminders, might overlook lifting the suspension when the reason for it no longer existed. We are not impressed by this argument. It is to be remembered that the rules which are authorized to be suspended (in this case Rule 34) are those established by the Commission itself because they are deemed desirable or necessary in the public interest under normal conditions. When, due to emergency conditions, it becomes necessary to suspend them it may be presumed that the Commission will be alert to restore them as soon as it becomes proper to do so. It is hardly to be expected that the members of the Commission would need to be reminded from time to time whether or not the war was still going on.

We have no doubt that the Commission has power to fix a definite period for the operation of a suspension order on those occasions where the duration of the emergency can be foreseen, as for example, where it is created by seasonal conditions, and we dare say that the Commission has on appropriate occasions pursued this course. But we see nothing in the statute that requires it to do so. And we think that where the emergency is one the duration of which is completely unpredictable, as in case of a great war, the Com-

mission has an equal power to make its suspension order run until such time as it may in the future determine that it may properly be ended.

Aside from the above no reason is offered in support of plaintiff's contention. No argument is presented that any carrier or shipper is placed at a disadvantage or is in any way adversely affected by the fact that the suspension order fixes no definite period of duration. No reason is advanced suggesting that the interpretation of the statute which plaintiff urges is logical or necessary for an effective or convenient operation of the suspending order. And no such reason occurs to us. There seems no difference in the practical effect or results between a situation where the Commission issues one order effective until such time as it may determine that the emergency has ceased and that where an order is entered limited to a definite date but is followed by other similar orders, each taking up where the preceding left off and successively extending the effective date until the emergency is ended. In either event the result is the same and is within the clear scope of the Commission's powers, which are to suspend existing rules and practices during an emergency and to determine when that emergency has ended.

We think that the attack upon the validity of Service Order 68 is without merit, and that the complaint should be dismissed.

____ ____,
U. S. Circuit Judge.

____ ____,
U. S. District Judge.

____ ____,
U. S. District Judge.

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APPENDIX "B"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA, LYNCHBURG DIVISION

Civil Action No. 201

AUBREY B. BURTON, Doing Business as A. B. Burton Company, *Plaintiff*,

versus

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., *Defendants*

(Argued May 6, 1949. Decided September 17, 1949.)

Before DOBIE, Circuit Judge, and PAUL and BARKSDALE, District Judges.

BARKSDALE, District Judge, dissenting:

I am in entire accord with the majority as to the conclusion reached on the jurisdictional question. However, I differ from my brethren in the conclusion I reach on the merits.

The emergency powers of the Commission under the statute above quoted (49 USCA 1 (15)) have been considered in a number of cases. *United States* v. *Koenig &c.*, 270 U. S. 512, *Peoria &c. Ry. Co.* v. *United States &c.*, 263 U. S. 528, *Avent* v. *United States*, 266 U. S. 127, 15 F. (2d) 616, *United States* v. *Michigan Portland Cement Co.*, 270 U. S. 521. However, the precise question here involved seems to have been considered in only one reported case, which was the decision of a one judge District Court in Missouri. *United States* v. *Thompson*, 58 F. Supp. 213. In that case, the court was considering subparagraph (d) of Section 1, paragraph (15) of the Act, wherein the pertinent language is "for such periods as it may determine," but it would not seem that there is any substantial difference between that phrase and the one here under consideration, ("for such time as may be determined.") The court there

held that the quoted language required the Commission, on the issuance of its emergency order, to determine and state therein the period during which the order shall be in effect. No case is cited as authority for this conclusion, and so far as I have been able to ascertain, there is none. Nor do I find any decision to the contrary.

There can be no doubt that the statute gives the Commission broad and drastic emergency powers. The Commission is given power to suspend the operation of any or all rules, regulations or practices with respect to car service, to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers, as in its opinion will best promote the service, to require joint or common use of terminals including main line track or tracks for a reasonable distance outside of such terminals as in its opinion will best meet the emergency, and to give directions for preference or priority in transportation, embargoes or movement of traffic under permits. These drastic powers may be exercised by the Commission "either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answers or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the commission may determine;". Almost the only limitation on the exercise of these powers is the limitation of time above referred to. Defendants admit that such orders must be limited to the period of the emergency, but contend that the Commission may determine the time during which such orders shall be effective, at any time after they have been issued. However, the fundamental difference between the practice of incorporating a time limitation in an emergency order, and the practice of determining the expiration date at some indefinite time after the order has been issued, is that unless some time limitation is incorporated in the order when issued, the Commission is not required to re-examine the situation and determine whether or not the emergency continues to exist, at any particular time. Mere inaction on the part of the Commission will result in the continued effectiveness of the emergency order. It would seem highly

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desirable that the Commission be vested with broad and drastic discretionary powers, and I find no expression to the contrary in any of the decided cases. However, it does seem that the exercise of such powers should be strictly within the limitations of the statute. No one questions the power of the Commission to extend the period of effectiveness of an emergency order beyond the termination date originally incorporated in the order, by a finding of a continuation of the emergency and a proper order of extension.

Emergency orders entered under the authority of this statute, while in the public interest, might result in great hardships to individual shippers and carriers. In emergencies, such hardships must be endured in the public interest. But I cannot see how the effectiveness of the Commission's emergency powers would be adversely affected by requiring it from time to time to re-examine the situation and determine whether or not the emergency continues and requires the continued operation of the emergency order.

I do not find any case wherein the conclusion reached in *United States* v. *Thompson, supra,* has been considered by any other court. However, in the only case I find which considers the above statute since the decision in *United States* v. *Thompson, supra, Iversen* v. *United States &c.,* 63 F. Supp. 1001, a three-judge district court in the District of Columbia had for consideration four emergency Service Orders. Each of these orders *expired, by its own terms, on a specific date.* Although the question here under consideration was not before the court, Judge Prettyman, speaking for the court, said (p. 1005):

> "It follows that when an emergency exists, the Commission can, without hearing, issue, *effective for a limited time,* orders in respect to these (demurrage) charges." (Italics supplied.)

I am therefore of the opinion that Service Order No. 68 was invalid, because it was effective for an indefinite time, and not for a time determined by the Commission, as required by the statute.

A. D. Barksdale,
United States District Judge.

APPENDIX "C"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA, CONTINUED AND HELD AT LYNCHBURG ON THE 17TH DAY OF SEPTEMBER, 1949

Civil Action No. 201

AUBREY B. BURTON, Doing Business as A. B. Burton Company, *Plaintiff*,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., *Defendants*

This matter having been heard upon the record prepared and upon the oral arguments on behalf of all parties and upon written briefs filed.

And the court having duly considered the same and being of opinion that the complaint is without merit, the reasons for which conclusion being stated in a written opinion this day filed as a part of the record.

It is accordingly ordered that the said complaint be, and it is hereby, dismissed at the cost of the plaintiff.

It is further ordered that the clerk of this court certify and mail copies hereof to the following:

Wilbert G. Burnette, Attorney at Law, Peoples Nat'l Bank Bldg., Lynchburg, Va.

Edward C. Dumbauld, Special Assistant to the Attorney General, Washington, D. C.

H. L. Underwood, Attorney, Interstate Commerce Commission, Washington, D. C.

ARMISTEAD M. DOBIE,
U. S. Circuit Judge.

JOHN PAUL,
U. S. District Judge.

A. D. BARKSDALE,
U. S. District Judge.

A copy, Teste:
OTWAY PETTICREW,
Deputy Clerk. (Seal.)

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IN THE

Supreme Court of the United States of America

October Term, 1949.

Case No.....

AUBREY B. BURTON, doing business as
A. B. BURTON COMPANY,
APPELLANT-PLAINTIFF,

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,
APPELLEES-DEFENDANTS.

REPLY BRIEF OF APPELLANT IN OPPOSITION TO MOTION TO AFFIRM, FILED BY APPELLEES.

STATEMENT.

This is a suit to have set aside and annulled certain orders entered by the Interstate Commerce Commission in Docket No. 29072, and Service Order No. 68 of January 30, 1942, and the enforcement, operation or execution thereof forever enjoined. By virtue of the provisions of Service Order No. 68, appellant was forced to do one of two things in making four shipments from Highland Park, Iowa to Keller, Virginia. Appellant had: (a) to accept and use whatever size car the

carriers elected to furnish; or (b) to refuse to use a car of a different size from the size of car ordered. The road scrapers had to move to Keller, Virginia, so appellant had no choice but to use the car furnished by the carriers regardless of its size. Appellant asked the Commission to give it relief from the provisions of Service Order No. 68 and, in response to a formal complaint, the Commission has denied appellant relief, which action of the Commission the three-judge District Court, by a 2 to 1 vote, in Civil Action No. 201, (District Court of the United States for the Western District of Virginia (Lynchburg Division)), has sustained the action of the Commission and from that decision appeal has been taken.

MOTION TO AFFIRM.

The appeal papers were served on November 22, 1949 and appellees' attention was directed to Rule 12 (3) of the Revised Rules of the Supreme Court of the United States, which rule permits appellees to file a motion to affirm within 15 days after the appeal papers are served. The time in which the motion could be filed in the lower court expired on December 7, 1949. The motion was received by the clerk of the lower court on December 8, 1949. Therefore, since the "Motion to Affirm" was not seasonably filed, there is no motion for appellant to answer. However, should we be incorrect in that belief and, being desirous of obtaining relief, we will, without prejudice to or waiving any of our rights, make certain observations in response to the aforesaid document called "Motion to Affirm."

APPELLEES.

The "Motion to Affirm," even if seasonably filed, has not been filed by a proper party because the motion has been filed by the Interstate Commerce Commission. Title 28, United States Code, Section 2323, provides, in part, as follows:

> "The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, *in any action involv-*

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ing the validity of such order or requirement or any part thereof, and the interest of such party." (Emphasis added.)

The issue before this Honorable Court is whether or not Section 1 (15) of the Interstate Commerce Act (49 USCA 1 (15)) permits or authorizes the Interstate Commerce Commission to make and issue an order such as Service Order No. 68, dated January 30, 1942, here under consideration. Therefore, the Commission is not a proper party, as an interpretation of a Statute is here involved.

SERVICE ORDER No. 68.

Of course, if we occupied the position of the Interstate Commerce Commission then we could see Service Order No. 68 as the Commission sees that order, but we are not in that position and we see how that order has affected us without accomplishing any of the purposes for which it was issued.

Section 1 (15) of the Act only provides that the Commission shall have authority to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the Commission only whenever the Commission is of the opinion that a shortage of equipment, congestion of traffic, or other emergency exists in any section of the country.

The authority the Commission claims which permits it to issue an order such as Service Order No. 68 is found only in Section 1 (15) of the Act (49 USCA 1 (15)) and in that section the Commission can only issue such an order as Service Order No. 68 when its application is limited to "any section of the country" and then only when its duration is limited for such time as may be determined by the Commission. Service Order No. 68 has nationwide application, contrary to the specific requirement of Section 1 (15) that the order be limited in its application to "in any section of the country" and that order is to remain in effect until the further order of the Commission, contrary to the specific requirement of Section 1 (15) of the Act that the order remain in effect for such time as may be determined by the Commission. Service Order No. 68 contained no such specific period of time for it to remain in effect, hence the order is void.

The same section, Section 1 (15) of the Act, provides that "in time of war or threatened war, the *President* may certify to the Commission that it is essential to the national defense and security that certain traffic shall have preference or priority in transportation, and the Commission shall under the power herein conferred, direct that such preference or priority be afforded." Consequently, Service Order No. 68 is contrary to Section 1 (15) of the Act in two respects: (a) it has nation-wide application when only "sectional application" was authorized by the Act; and (b) it contains no expiration date contrary to the requirement that an expiration date be determined by the Commission—for such time as may be determined by the Commission. Therefore, the motion to affirm, if seasonably filed, should be denied, and this Honorable Court, after full review, should determine the meaning of the provisions of Section 1 (15) of the Act (49 USCA 1 (15)), especially the meaning of *"for such time as may be determined by the Commission."*

TWO VIEWS OF THE SAME LANGUAGE.

The decision of the District Court in this proceeding is contrary to the decision of a District Court of Missouri in *United States* v. *Thompson*, 58 F. Supp. 213, and, no doubt, had this action been brought in the Missouri District Court, we would have had a different decision from the one we have in this proceeding, as the Court of Missouri, at pages 216 and 217 of 58 F. Supp. said:

> "The law places the burden on the Commission in the first instance of determining the existence of an emergency as a basis for the exercise of the extraordinary powers conferred by the Act, without notice or hearing, and for the issuance of the order. It is apparent from the Act that it was intended that the burden should remain with the Commission to determine the duration of the emergency. By the requirement that the order be for 'periods' as determined by the Commission, the Commission is called upon to reexamine conditions at the end of the period during which, at time of issuing the order, in the judgment of the Commission, the emergency would continue. An order containing no limitation as to time

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> and therefore no 'period' places no such burden on the Commission. It relieves the Commission of the obligation of determining the duration of the emergency and when it has terminated. An order, on its face, to run to the continued existence of an emergency except at the convenience or pleasure of the Commission, and in effect places upon those whose property is affected the burden of proving to the Commission that the emergency no longer exists."

The views of the three-judge Court, in this proceeding, on the proper meaning of *"for such time as may be determined by the Commission"* are contrary to the views of the Missouri District Court in 58 F. Supp. 213. Consequently, justice, we believe, dictates that this Honorable Court should deny the motion to affirm and then fully review this cause.

REGULATE COMMERCE.

The people of the United States of America delegated to Congress, in Article 1, Section 8 (3), of the Constitution of the United States, the power to regulate commerce with foreign nations and among the several states and with the Indian tribes. Congress, by the Interstate Commerce Act (Part 1) (49 USCA) created the Interstate Commerce Commission for the purpose of administering and enforcing the provisions of the Act with respect *only to transportation by carriers.* We do not think that rules and regulations which unjustly enrich the railroads for service not performed at the expense of appellant is regulating commerce within the meaning of the provisions of the Constitution.

Therefore, inasmuch as Service Order No. 68 does more than regulate commerce in that it provides means by which the carriers can enrich themselves by furnishing larger size cars than the size of cars ordered by the shipper, the Motion to Affirm must be denied.

CONCLUSION.

We have tried herein to make clear our proposition and to prove that the Motion to Affirm should be overruled. Conse-

quently, inasmuch as one District Court has held contrary views on the same language to the views of the District Court rendering this decision, we believe that substantial injustice will be done unless the conflict is resolved. We, therefore, pray that the motion to affirm be denied.

Respectfully submitted,

AUBREY B. BURTON, doing business as

A. B. BURTON COMPANY.

By: W. G. BURNETTE, *Counsel.*

1104-5 Peoples National Bank Building

Lynchburg, Virginia

December 23, 1949.

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In the District Court of the United States for the Western District of Virginia Lynchburg Division

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CIVIL ACTION No. 201

AUBREY B. BURTON, D/B/A A. B. BURTON COMPANY, PLAINTIFF

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

MOTION TO AFFIRM

Proffered for filing Dec. 8, 1949. C. E. Gentry, Clerk. By Otway Petticrew, Deputy Clerk.

Appellee, pursuant to Rule 12, Paragraph 3, of the Revised Rules of the Supreme Court of the United States, moves that the judgment and decree of the District Court be affirmed.

This is a direct appeal from a final judgment and decree, entered on September 17, 1949,[1] by a specially constituted District Court of three judges, pursuant to Sections 1253, 2284 and 2325, Title 28 of the United States Code, dismissing appellant's complaint seeking to set aside an order of the Inter-

[1] The Court also rendered its opinion on September 17, 1949; one judge dissenting.

state Commerce Commission. Appeal was allowed on November 16, 1949, and appeal papers served on November 22, 1949.

One of the Commission's orders under attack, dated January 30, 1942, is designated as Service Order No. 68,[2] (49 U.S.C. 1(15)),[3] which sus-

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[2] Service Order No. 68, issued pursuant to Section 1(15), Part I of the Interstate Commerce Act (49 U.S.C. 1(15)), in terms provided that due to the existing state of war, and the emergency caused thereby, immediate action was necessary to prevent a shortage of railway equipment and congestion of traffic; that the provisions contained in Rules 24 and 34 of Consolidated Freight Classification No. 14, and other tariffs containing provisions with respect to furnishing, substitution, and use of multiple cars for single shipments, subject to carload rates, results in wasteful car service and that such misuse and wasteful use of cars as detrimental to the public interest and the prosecution of the war; and that the operation of Rule 34, insofar as it permits railway freight cars to be used for shipment of carload freight otherwise than subject to the carload minimum weight for each car actually used, is suspended, and that the order shall become effective February 15, 1942, and shall remain in force until further order of the Commission.

[3] Section 1(15) of the Act reads (in part) as follows:

> "Whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine: (a) to suspend the operation of any or all rules, regulations or practices then established with respect to car service for such time as may be determined by the Commission; (b) to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people, upon such terms of compensation as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to

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pended the operation of Rule 34 of the Consolidated Freight Classification.[4]

Following the entry of the aforesaid order, to wit, on April 17, 18 and 21, Herman M. Brown Company shipped four carloads of road building machinery from Highland Park, Iowa, to appellant at Keller, Virginia. The shipper had ordered of the carrier four 40-foot cars for these shipments, but the carrier not having available the size car ordered, delivered two 48½-foot cars, one 42-foot 1-inch car, and one 41-foot car. The weights of each shipment were less than the carload minimum provided for open cars of 40 feet in length on which the rate, prior to the effective date of Service Order No. 68, suspending Rule 34, would have been based on the minimum weight applicable on the 40-foot cars ordered. Due to these circumstances appellant was required to pay freight charges assessed for the minimum weights applicable on the larger cars furnished which aggregated $276.00 more than he would have been required to pay had Rule 34 been in force.

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be just and reasonable; (c) to require such joint or common use of terminals, including main-line track or tracks for a reasonable distance outside of such terminals, as in its opinion will best meet the emergency and serve the public interest, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; and (d) to give directions for preference or priority in transportation, embargoes, or movement of traffic under permits, at such time and for such periods as it may determine, and to modify, change, suspend, or annul them. * * * "

[4] Rule 34 of the Consolidated Classification provides in substance that railroads are permitted to furnish shippers longer cars than ordered if the carrier is unable to furnish the size of car requested, and the charges therefor will be based upon the weight for the size of the car ordered rather than upon the weight for the size of the car furnished and used.

Appellant instituted a complaint proceeding before the Commission in which he alleged that the freight charges assessed against him on the aforesaid shipments were unjust and unreasonable and sought to have the Commission award him reparations for the alleged overcharges. This complaint was dismissed by the Commission on September 28, 1944, but the proceedings were later reopened on appellant's petition therefor and after hearing and oral argument, the Commission, by its report and order of December 5, 1945, again dismissed the complaint, affirming its earlier finding that the freight charges based on carload minima for cars furnished in lieu of carload minima for cars of size ordered on shipments of road building machinery from Highland Park, Iowa, to Keller, Va., were not shown to have been, or to be, unreasonable.

With respect to appellant's insistence that the Commission's action in suspending the operation of Rule 34 (the so-called carriers' convenience provision) did not authorize the carriers to ignore shipper's order, and that it was unreasonable for the carriers to furnish longer cars than ordered, the Commission found that while the facts established that it was possible for the shipper to have loaded the shipments on the smaller cars ordered, there was an absence of any showing of the conditions under which the longer cars were furnished or the reasons why such longer cars were not declined by the shipper at origin and not used. The shipper could have declined to accept these cars but he did not do so.[5]

[5] "The facts of record, as summarized in the prior report, are confirmed by the record on oral hearing. It is not shown

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Appellant's petition for reconsideration and rehearing was denied by the Commission. Later in January 1948, appellant filed another petition for reopening and reconsideration which the Commission denied by its order of April 5, 1948. In this last petition plaintiff for the first time alleged that Service Order No. 68 was invalid because no termination date was fixed in the order.

By its suit in the statutory three-judge court to set aside the orders of the Commission, hereinbefore mentioned, we submit that appellant's real purpose was to have that Court adjudicate that

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that defendants were negligent in furnishing the larger cars. The shipper accepted and used the cars furnished in order to meet complainant's urgent need for the road scrapers. It is clear that the charges collected were applicable under the governing tariff provision established on March 17, 1942, in compliance with Service Order No. 58, providing, in effect, that where the shipper orders a car of a certain size and the carrier furnishes and the shipper uses a larger car, the applicable charges are those based on the carload minimum for the car furnished and used and not the carload minimum published in defendants' tariff for the car ordered.

"Complainant contends that to permit defendants to collect and retain charges based on the higher minima, provided for cars of the length used, is not in consonance with the declared purpose of the provision which was to conserve equipment in order to aid in the effective prosecution of World War II. This contention does not accord with provisions of our published order. By providing, in effect, that a shipper must reject the larger car, or at its convenience accept the car furnished for loading and pay the applicable charges for its use, the requirements contained in the provision are fair both to the shipper and carrier, and were clearly designed to conserve equipment by discouraging the carrier from furnishing and the shipper from accepting and using a car larger than actually necessary for transportation of the shipment. This objective of the tariff provision would not obtain if refund of freight charges were permitted to the basis of the lower minima for the shorter cars ordered but not used." (Commission's report dated December 5, 1945, attached to plaintiff's complaint (filed in three-judge District Court) as Exhibit 1.)

Service Order No. 68 was invalid when issued and to direct the Commission to award appellant reparations. The principal ground of invalidity urged was that the order was made effective for an indefinite period in that it failed to fix a date for its termination. Appellee insists that, as the District Court held, the Commission was not required to fix a termination date of an emergency in its orders issued under Section 1(15) as a condition to their validity. In fact it was impossible for the Commission or any other tribunal or person to know or to determine when the war would end. Moreover, the statute (Section 1(15)) confers broad powers on the Commission in issuing orders of this sort. This section provides that when the Commission finds an emergency exists it may suspend existing rules, regulations and practices upon its own initiative, with or without notice or hearing, as its judgment dictates. It would be difficult to conceive of a statute which confers broader authority or greater administrative discretion. In view of this almost unrestricted power which Congress has conferred upon the Commission, the three-judge District Court could not see, nor can appellee see, any justification for the imposition upon it of a restriction which is neither expressed nor implied by the language used in the statute.

Appellant relies upon the case of *United States v. Thompson*, (D.C. Mo.) 58 Fed. Supp. 213, 216-7, in support of the position that if an order issued under Section 1(15) contains no fixed date for its termination it is invalid. The *Thompson* case is distinguishable from the instant case in that the

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former suit was instituted under a statute which was penal in application and provided for a penalty for each violation of the Commission's order. With respect to the penal application of the statute under which that action was brought the Court observed that the statute should be strictly construed.[6]

In its jurisdictional statement appellant urges that the instant proceedings should be reviewed by the Supreme Court and the decision of the statutory three-judge District Court reversed because that Court gave a different interpretation to the meaning of the provisions of Section 1(15) of the Interstate Commerce Act than that given by the District Court (a single judge) in the *Thompson* case, *supra*.[7] Appellant is attempting to invoke the provision of paragraph 5(b) of Rule 38 of the Revised Rules of the Supreme Court of the United States as a means of obtaining review of his case by the Supreme Court. That rule applies to a review on writs of certiorari where there have been conflicting decisions of Circuit Courts of Appeals,[8] and there is no similar rule applicable to decisions of United States District Courts. Therefore, it is insisted that this rule of the Supreme Court

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[6] "In reaching the conclusions here expressed, we have not been unmindful that the statute under which the Government is proceeding, being penal in its application, providing a penalty for each violation * * * which penalty the plaintiff seeks to collect by this action, should be strictly construed." [Citing Providence Steam Engine Co. v. Hubbard, 101 U.S. 188, 191.] U. S. v. Thompson, 58 F. Supp. 213, 218.

[7] Jurisdictional Statement, pages 3-4.

[8] Rule 38 provides for review on writ of certiorari of decisions of Circuit Courts of Appeals, paragraph 5:

> "(b) Where a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter. * * *"

affords appellant no basis for a review of the decision of the statutory court.

Appellee submits that this appeal involves no substantial questions. Appellant's arguments, as revealed by its Jurisdictional Statement, with the exception of the claim that Service Order No. 68 is invalid because no termination date was fixed in the order, are simply reiterations of arguments previously rejected by the Commission and the three-judge District Court, addressed to matters lying within the discretion of the Commission. With respect to the claim of invalidity of the Service Order, for the reason asserted, it is pointed out that the three-judge court considered this ground relied upon by appellant and rejected it because there was no provision, expressed or implied, by the language of the statute furnishing any justification for such an interpretation.

Furthermore, it is insisted that Congress never intended that Section 1(15) of the Act should have the distorted and strained construction which is contended for by appellant. In this connection reference is made to appellant's claim as revealed in its Jurisdictional Statement, that Service Order No. 68 is invalid because the statute does not confer authority on the Commission to suspend Rule 34 of the Classification due to an emergency on a nation-wide basis but only when such emergency exists in certain sections of the country. There is no foundation whatsoever for such an interpretation, and further comment with respect thereto is believed unnecessary.

For the foregoing reasons, it is evident that this appeal presents no substantial question. It is,

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therefore, respectfully submitted that the judgment of the District Court should be affirmed.

DANIEL W. KNOWLTON,
Chief Counsel,
Interstate Commerce Commission.

DECEMBER, 1949

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FEBRUARY 6, 1950.*

Per Curiam Decisions.

No. 497. BURTON, DOING BUSINESS AS A. B. BURTON CO., *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Western District of Virginia. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *W. G. Burnette* for appellant. *Daniel W. Knowlton* for the Interstate Commerce Commission, appellee.

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